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No. 79-180

In the Supreme Court of the United States

OCTOBER TERM 1979

PATRICK T. SHEEDY, Personal Representative for the Estate of CECELIA BINN, Deceased,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

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INDEX

PAGE

I. The respondent incorrectly addressed the jurisdictional issue in their Memorandum For The United States In Opposition 2

II. Reliance of the Supreme Court on the Seventh Circuit's order is misplaced due to the fact that the case law fails to meet the issue and is not in point 4

III. It is not a issue of sovereignty before the court, but rather the question of whether or not the I.R.S. can lawfully conceal information that would allow the petitioner to exercise its privilege to sue the government as is granted in I.R.C. §6511(a) 8

IV. The final jurisdictional issue is to determine whether or not District Courts are able to freely exercise jurisdiction over equitable matters 9

Conclusion 10

CITATIONS

Cases

Ancel v. United States, 398 F. 2d 456 (7th Cir. 1968) 3

Baily v. Glover, 21 Wall 342 (1875) 8

Bruno v. United States, 547 F. 2d 71 (8th Cir. 1976) 3

Bryan v. United States, 99 F. 2d 549 (10th Cir. 1938), *cert. denied,* 305 U.S. 611 (1939) 4, 6

Crimson v. United States, 550 F. 2d 1205 (9th Cir. 1977) 3

Glus v. Brooklyn Eastern Terminal, 359 U.S. 393 (1958) 8

Holmberg v. Armbrecht, 327 U.S. 392 (1945) 6, 7, 8

PAGE

Kennecott Copper Corp. v. State Tax Commission, 327 U.S. 573 (1946) 9
Kreiger v. United States, 539 F. 2d 317 (3rd Cir. 1976) 3, 4, 7, 8
Lemon v. Kurtzman, 411 U.S. 210 (1972) 8
Lewis v. Sandler, 498 F. 2d 395 (4th Cir. 1976) 3
Lowy v. Commissioner of Internal Revenue, 288 F. 2d 517 (2d Cir. 1961), (L. Hand, J.), *cert. denied*, 368 U.S. 984 (1961) 5
Marbury v. Madison, 1 Cranch 137 (1803) 10
Mitchell v. Demario, 361 U.S. 288 (1959) 9
Porter v. Warner, 328 U.S. 395 (1945) 9
Russel v. Todd, 309 U.S. 280 (1939) 6
Soriano v. United States, 352 U.S. 270 (1957) 4, 5
Tucker v. Alexander, 275 U.S. 228 (1927) 3
United States v. Diehl, 460 F. Supp. 1282 (1978), *Aff'd*, 586 F.2d 1080 5
United States v. Felt & Tarrant Mfg. Co., 283 U.S. 269 (1931) 3
United States v. Rochelle, 363 F. 2d 225 (5th Cir. 1966) 3

Statutes

Internal Revenue Code of 1954, Sec. 7422(a) 2
Internal Revenue Code, §6511(a) 4, 6, 8, 10
Internal Revenue Code, §6501(a) 5, 10
26 U.S.C. §6511(a) 3
28 U.S.C. §1346(a)(1) 2

Other Authorities

R. Robertson & F. Kirkham, *Jurisdiction of the Supreme Court of the United States*, §317 (2d ed. R. Wolfson & P. Kurland 1951) 2

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PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

Your Petitioner, Patrick T. Sheedy, Personal Representative for the Estate of Cecelia Binn, deceased, respectfully prays that the Court reconsider its order denying his Petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit, in the above entitled cause, entered by this Court on October 15, 1979, and grant the Petition.

As grounds for this Petition, Petitioner respectfully requests the Court's consideration of the following:

On October 15, 1979, the petitioner received notification from the Supreme Court of the United States that its Petition for Writ of Certiorari had been denied. The con-

tents of the letter were extremely brief, and the grounds for the denial were not stated therein. It leads this petitioner to believe that the Supreme Court of the United States denied the Writ of Certiorari on the basis of a jurisdictional question. According to a noted treatise on the subject of jurisdiction; "There are other unusual circumstances under which a petition for rehearing may not be granted. Certiorari may have been denied originally for a jurisdictional reason, and the petitioners may be able to show the Court that it was in error."[1] It is the intention of this petitioner to show the court that it was in error to deny this writ.

I. The respondent incorrectly addressed the jurisdictional issue in their MEMORANDUM FOR THE UNITED STATES IN OPPOSITION.

The jurisdictional basis for suits against the United States for refund of taxes is 28 U.S.C. §1346(a)(1). Congress has limited the government's consent to be sued in such cases to those parties that filed a timely refund claim. *See,* Section 7422(a) of the Internal Revenue Code of 1954.

Since there was no case law cited in the letter the petitioner received from the Court denying their writ, petitioner assumes that the respondent's MEMORANDUM FOR THE UNITED STATES IN OPPOSITION stands for the Supreme Court's position on the issue. The jurisdictional error herein, rests with this Court's misplaced reliance on the respondent's case law. In the respondent's MEMORANDUM (p. 3), it was stated that "This provision uniformly has been interpreted as establishing a jurisdictional requirement that cannot be waived." This rule

[1] R. Robertson & F. Kirkham, *Jurisdiction of the Supreme Court of the United States*, §317 (2d ed. R. Wolfson & P. Kurland 1951).

of law, is followed by case law that fails to address the key issue in this matter, to-wit; Whether fraudulent concealment is an exception to the jurisdictional bar?[2] The Su-

[2] On page three (3) of the respondent's MEMORANDUM FOR THE UNITED STATES IN OPPOSITION, the respondent has a chain citation of cases that are in support of the rule of law that it set forth therein. Your petitioner has checked each case and finds multiple flaws with the respondent's supportive case law.

In *United States* v. *Felt & Tarrant Mfg. Co.*, 283 U.S. 269, 273 (1931), the ". . . object of such requirement [timely refund claim] is to advise officials of the demands or claims to be asserted. . ." The case states nothing in support of the theory that the jurisdictional requirement cannot be waived, but rather recognizes reasons for allowing a waiver and cites *Tucker* v. *Alexander*, 275 U.S. 228 (1927).

In *Ancel* v. *U.S.*, 398 F. 2d 456, 458 (7th Cir. 1968), the court decided that 26 U.S.C. §6511(a) applied to taxpayers as well as transferees. The decision never addressed the issue of fraudulent concealment.

Crimson v. *U.S.*, 550 F. 2d 1205 (9th Cir. 1977). The appellants filed an incorrect refund form. The court held that it was an insufficient refund claim. The court made no reference to fraudulent concealment.

Bruno v. *U.S.*, 547 F. 2d 71 (8th Cir. 1976). The case stated that there was no suit unless there is exact compliance with 26 U.S.C. §6511(a). The decision, however, does not dismiss fraudulent concealments, but rather distinguishes it. Furthermore, the plaintiff in this matter had prior knowledge that the bonds seized were due.

Kreiger v. *U.S.*, 539 F. 2d 317 (3rd Cir. 1976). This case is addressed more fully in this petition for rehearing. *See,* page 7, infra.

Lewis v. *Sandler*, 498 F. 2d 395, 399-400 (4th Cir. 1976). The decision ruled that failure to file a refund claim is fatal, yet they cite their reliance upon *U.S.* v. *Felt & Tarrant Mfg. Co., supra.* This case was discussed and dismissed above as to the issue of fraudulent concealment.

Lastly, *U.S.* v. *Rochelle*, 363 F. 2d 225, 231 (5th Cir. 1966). This case can be distinguished from the issue of fraudulent concealment because the plaintiff had prior knowledge of the improper collection of taxes.

preme Court's reliance upon this case law is misplaced and has led this court to render an erroneous decision on the jurisdictional issue.

II. Reliance of the Supreme Court on the Seventh Circuit's order is misplaced due to the fact that the case law fails to meet the issue and is not in point.

If this court relied on the case law found in the Seventh Circuit's order denying reversal of the district court's ruling, it too would lead to the rendering of an erroneous decision. There, in considering the jurisdictional bar, the Appellate court refused to grant jurisdiction on the grounds that the petitioner's claim failed to meet the requirements set forth in I.R.C. §6511(a). The court based its decision on three cases: *Soriano* v. *United States,* 352 U.S. 270, 276 (1957); *Kreiger* v. *United States,* 539 F. 2d 317, 321 (3rd Cir. 1976); and *Bryan* v. *United States,* 99 F. 2d 549 (10th Cir. 1938), *cert. denied,* 305 U.S. 611 (1939). Careful analysis of these decisions completely distinguishes them from the facts in the case at bar.

First, in the case of *Soriano* v. *U.S., supra,* the matter first came before the Court of Claims and not before a Federal District Court. The case dealt with the question of whether or not war would be a valid basis for the tolling of the relevant statute of limitations. The party making the allegations knew that the "disability had ceased", but erroneously assumed that the statute of limitations for compensation for requisitioning had been tolled due to the war. This is not the situation found herein.

Your petitioner never received notification of the illegally assessed taxes. It was not until 4 months after the 2 year statute of limitations had run against the petitioner that there was any indication or notice that a tax return

had been filed in 1969 by the previous personal representative of the estate.

Furthermore, *Soriano* v. *U.S., supra,* states that ". . . enforcement of the rule might result in hardship in some cases . . ." *Id.* at 321. Had the I.R.S. been a private citizen, this "hardship" would have fallen on their shoulders. The statute of limitations found in I.R.C. §6501(a) for the assessment of taxes is three (3) years from the date that the initial tax return is filed. In the present case three (3) years had passed from the initial filing on November 19, 1969 and long before the time Attorney Sheedy contacted the I.R.S. in October, 1973. When Attorney Sheedy was appointed by the court as successor personal representative to the Estate of Cecilia Binn, he inquired of the I.R.S. as to whether an estate tax return had been filed. He was misrepresented to, and led to believe that no return had ever been filed, and that the tax was due and owing. Had it not been for the fraudulent misrepresentation to Attorney Sheedy, collection of the estate taxes would have been precluded by the running of the statute of limitations found in I.R.C. §6501(a). The court will note that had Attorney Sheedy been the party to perpetrate the fraud herein, the I.R.S. would be able to avoid the three (3) year statute of limitations imposed by §6501(a), for it has been stated that: "Proof as to fraud as to any one of the alleged deficiencies permits a general reaudit of the return in its entirety, and the statute of limitations is tolled as to all deficiencies." *U.S.* v. *Diehl,* 460 F. Supp. 1282, 1287 (1978), *Aff'd,* 586 F.2d 1080. *See also, Lowy* v. *Commissioner of Internal Revenue,* 288 F. 2d 517 (2d Cir. 1961), (L. Hand, J.), *cert. denied,* 368 U.S. 984 (1961). It is inequitable to hold that the I.R.S. is able to toll the statute of limitations where the taxpayer may not.

The *Diehl* Court stated, "It is important to note that the government's purpose in seeking to prove fraud in

this case is limited solely to avoidance of the 3 year statute of limitations." *Id.* at 1287. We too, as petitioners for the rehearing of the order denying the writ, limit the allegations of fraud to the issue involving the tolling of the statute of limitations. This petitioner has not "slept on his rights so as to make the decree against the [respondent] unfair." *Holmberg* v. *Armbrecht,* 327 U.S. 392, 396 (1945); *See also, Russel* v. *Todd,* 309 U.S. 280 (1939).

This Court has also mistakenly relied upon *Bryan* v. *U.S., supra,* which is quoted in the Seventh Circuit's Order refusing to reverse the district court's decision that there is lack of jurisdiction. The fact situation, as set forth in *Bryan* v. *U.S.,* is substantially distinguished from the facts set forth herein. In *Bryan,* the I.R.S. agents, as well as the directors of the plaintiff's corporation, collaborated in the perpetration of fraud. In essence the petitioner, via an agency relationship, received notice that his taxes were illegally assessed and consequently he should have filed a refund claim within the time set forth in I.R.C. §6511(a). The court ruled that the I.R.S. agents had acted beyond the scope of their duties and therefore, the government could not be held liable. It is submitted that the case of *Bryan* is unique in that the government could not readily evaluate or deny the allegations made and thus it placed an unreasonable burden upon the government's orderly administrative functions.

The petitioner in this case never received notification, either directly or indirectly, until four (4) months after the two (2) year statute of limitations had run. Furthermore, this matter never involved a third party concealment as was found in *Bryan.* This, when coupled with the fact that the I.R.S. was the only party that did possess the information necessary to establish taxes due by the estate, further exemplifies the difference between *Bryan*

and the case at Bar. The I.R.S. agents did not go beyond the scope of their duties, but rather failed to meet the demands of their job. Their inefficiency and neglect should not be tolerated at the expense of the public who relies on such privileged information.

Lastly, the appellate court, in examining the jurisdictional issue, relied upon the case *Kreiger* v. *U.S., supra.* Your petitioner contends that the case is applicable, but that the appellate court was in error to apply the general rule found therein while failing to note the exception to that rule. It is the contention of this petitioner that the present case falls under the exception noted in the *Kreiger* decision. A careful analysis of the facts therein, leads one to conclude that the petition for rehearing must prevail upon the issue of fraudulent concealment. *Kreiger* states, "Limitations and conditions upon which the government consents to be sued must be strictly observed and exceptions are not to be implied." *Id.* at 321. The rationale behind this rule, i.e., of strict adherence to the specified statute of limitations, ". . . is to protect defendants from unfair surprise." *Id.* at 322. The decision rendered goes even further to declare; ". . . *tolling makes sense only where such unfairness is not a consideration because the defendant's willful or negligent conduct has caused the delay. E.g. Holmberg, supra (fraudulent concealment)* . . . *That is not the case here.*" (Emphasis supplied). Clearly the court in rendering its decision made a distinction between the facts found therein and the fact situation arising under *Holmberg* v. *Ambrecht,* 327 U.S. 392 (1945). In *Holmberg* the Supreme Court ruled:

> . . . And so this court long ago adopted as its own the old chancery rule that where a plaintiff has been injured by fraud and remains ignorant of it without any fault or want of diligence or care on his part, the bar of the statute does not begin to run until the fraud is discovered though there is no special cir-

> cumstances of efforts on the part of the party committing the fraud to conceal it from the knowledge of the other party.

327 U.S. 392. *See also, Baily* v. *Glover,* 21 Wall 342, 348 (1875).

The petitioner cited this case in his Petition for Writ of Certiorari and the respondent, in its MEMORANDUM, was unable to cite case law refuting this rule. There is no case law that will undermine the rule because, "This equitable doctrine is read into every federal statute of limitations." *Id. See, Glus* v. *Brooklyn Eastern Terminal,* 359 U.S. 393 (1958); *Lemon* v. *Kurtzman,* 411 U.S. 201 (1972). The respondent addressed the problem by stating that the *Holmberg* and *Baily* cases did not involve a suit against a sovereign. This conclusion is erroneous especially when it is recognized in *Kreiger* v. *U.S., supra,* which is a case against the government.

The *Kreiger* decision goes one step further to clarify the rule set forth; "In addition, we note that it does not appear that concealment necessarily prevented the filing of a timely claim for refund." *Id.* at 322. The petitioner makes it clear to this court that it is concealment, and only concealment, that prevented the attorney from filing a timely refund claim herein. No amount of reasonable diligence would have altered the present situation.

III. It is not a issue of sovereignty before the court, but rather the question of whether or not the I.R.S. can lawfully conceal information that would allow the petitioner to exercise its privilege to sue the government as is granted in I.R.C. §6511(a).

It is clear that the legislature has made an exception to the theory of sovereign immunity by enacting I.R.C. §6511 (a). President Lincoln said in a message to Congress; "It

is as much the duty of Government to render prompt justice against itself in favor of citizens as it is to administer the same between private individuals." Quoted in *Kennecott Copper Corp.* v. *State Tax Commission,* 327 U.S. 573 (1946). The area of basic contention does not revolve around whether sovereign immunity is desirable or not, but rather on what is the proper manner in which the doctrine should be applied. Here, the government has agreed to entertain suits against it in tax matters, and it should not be within the power of the I.R.S. to circumvent that intention through fraudulent concealment.

IV. The final jurisdictional issue is to determine whether or not District Courts are able to freely exercise jurisdiction over equitable matters.

In *Porter* v. *Warner,* 328 U.S. 395 (1945), the Court stated;

> Unless otherwise provided by statute all the inherent equitable powers of the District Court are available for the proper and complete exercise of that jurisdiction. And since the public interest is involved in a proceeding of this nature, those equitable powers assume an even broader and more flexible character than when only a private controversy is at stake . . .

328 U.S. 395. *See also, Mitchell* v. *Demario,* 361 U.S. 288 (1959).

The appellate court, by affirming the District Court's decision, has improperly overruled the *Mitchell* and *Porter* cases in that the district court stated; ". . . General principles of equity may not be applied in tax cases . . ." (*See,* App. 4 in Petition for Writ of Certiorari). It is respectfully submitted that the District Court failed to follow the *Mitchell* and *Porter* decisions.

Consequently, to deny this petition for Writ of Ceriorari would be to allow the perpetration of fraud by the I.R.S.

upon the people in tax matters. The basis of the dilemma rests in equity, but even more so, this Court cannot deny the rehearing of the issue on the basis that it fails to meet a jurisdictional requirement. There is no case law to support this decision. It is clear that Congress has created a privilege to sue the sovereign in certain instances, however, when the legislature sees fit to make an exception to the rule of sovereign immunity, it should not be within the power of the taxing officials to circumvent the statute of limitations set out in I.R.C. §6511(a) and §6501(a) through the means of fraudulent concealment and malfeasance.

CONCLUSION

For the reasons set forth in this Petition for Rehearing, as well as in the Petition for Certiorari previously filed, rehearing and certiorari should now be granted, for it has been stated:

> "The government of the United States has been emphatically termed a government of laws and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right. . . . It behooves us then to enquire whether there be in its composition any ingredient which shall exempt it from legal investigation or exclude the injured party from legal redress . . ."

Marbury v. *Madison*, 1 Cranch 137 (1803).

Respectfully submitted,

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